APPENDIX

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 41,072

STATE OF KANSAS, ex rel. Robert J. Foster, County Attorney of Wyandotte County, Kansas, *Plaintiff*

v.

THE CITY OF KANSAS CITY, KANSAS, a municipal corporation; PAUL F. MITCHUM, Mayor Commissioner; EARL B. SWARNER, Commissioner of Finance, Health and Public Property; JOSEPH P. REGAN, Commissioner of Boulevards, Parks and Streets; and QUINDARO TOWNSHIP, Wyandotte County, Kansas, a body politic and corporate, *Defendants*

PHILLIPS PETROLEUM COMPANY, a corporation;
UNION PACIFIC RAILROAD COMPANY, a corporation;
SEALRIGHT-OSWEGO FALLS CORPORATION, a corporation; and
GIRTEN INVESTMENT COMPANY, a corporation,
Petitioners for Leave to Intervene

Syllabus by the Court

QUO WARRANTO—*Attorney General Officer of Court—Right to Intervene and Dismiss.*

In an original proceeding in quo warranto commenced by the state, on the relation of the county attorney, a motion by the attorney general to intervene, supersede and dismiss, as is more fully narrated in the opinion, is considered and it is *held:* The corporations petitioning for leave to intervene are not proper parties (*Smith* v. *City of Emporia*, 168 Kan. 187, 211 P. 2d 101); the attorney general is entitled to intervene and supersede the county attorney in this court in cases involving the state or public interest; the attorney general, as an officer of this court, has the duty to limit his conduct to that

prescribed by the code of professional ethics, and the governor, as principal executive officer of the state, cannot control the officers of this court, which heads up the judicial branch of our state government; the right of the attorney general, as plaintiff, to dismiss this action is absolute and the township, one municipality, cannot question the organization, or reorganization, of the city, another municipality, because that can only be done by the state through its proper officers. It is further *held*, the case is dismissed.

Original action in *quo warranto*. Opinion filed March 5, 1960. Dismissed.

The opinion of the court was delivered by

ROBB, J.: This original proceeding in quo warranto commenced by the state, on the relation of the county attorney, seeks to test the validity of certain ordinances of the city of Kansas City by requiring the defendant city officials, Mitchum, Swarner, and Regan, in their official capacity, to show by what authority they assumed a portion of the Fairfax Industrial district and made it part of the city when they enacted and published certain ordinances annexing such land.

Two previous original quo warranto proceedings of similar character have been before this court. (*State, ex rel.*, v. *City of Kansas City*, 169 Kan. 702, 222 P. 2nd 714; *State, ex rel.*, v. *City of Kansas City*, 181 Kan. 870, 317 P. 2nd 806.)

The state filed its amended and supplemental petition naming the city, Mitchum, Swarner, Regan, and Quindaro township as defendants. On October 8, 1958, Quindaro township filed its answer admitting the allegations of the petition and referring in detail to the two previous cases above mentioned. It attacked the city's efforts to annex by ordinances the land in question, which is a part of Quindaro township. On October 28, 1958, the city and its named officials (hereafter referred to collectively as the

city) by way of answer filed a general denial of the affirmative allegations in Quindaro's answer and a general demurrer thereto was incorporated into its answer. On the same day the city, in answer to the amended and supplemental petition of the state, admitted a major portion thereof and joined issue on the remainder. On November 13, 1958, the state filed a lengthy reply to the answer of the city. Since the merits of the case are not before us at this stage of the proceedings, we shall not detail the above-mentioned pleadings.

The parties failed to agree upon a stipulation of facts and as a result of a renewed application dated April 22, 1959, for appointment of a commissioner, this court on June 30, 1959, appointed the Honorable Jay W. Scovel of Independence, Kansas, as commissioner to hear the evidence, which procedure was the same as that followed in the two earlier cases previously referred to.

Donald E. Martin's term of office as Wyandotte county attorney expired in January, 1959, and his newly-elected successor, Robert J. Foster, assumed the duties of the office including the substitution of his name for that of Martin in this case. On July 22, 1959, the attorney general, under the directive set forth in the first part of G. S. 1949, 75-702 (later quoted herein) filed a motion to intervene in the case, to supersede county attorney Foster, and to strike all references in the pleadings to Quindaro township, as well as its answer and cross petition, because the township had no justiciable interest, it was neither a necessary nor proper party, and its answer and cross petition had no lawful place in the proceeding. The attorney general further moved that in view of the expense to the taxpayers of past litigation on this annexation problem of the city, it would be in the public interest to terminate and dismiss the present action.

Acknowledgment of service by Foster was as follows:

> "The undersigned County Attorney of Wyandotte County, Kansas, hereby acknowledges receipt of a copy of the foregoing Motion and states and *he has read the same and lodges no objection to supersession by the Attorney General in such action.* [Our emphasis].
>
> "/s/ ROBERT J. FOSTER, County Attorney of Wyandotte County, Kansas. Kansas City, Kansas."

After service on it, Quindaro filed a formal objection to the attorney general's intervention because the matter was ready for trial before the commissioner and the attempted supersession was only to prevent submission of the controversy and prevent judicial determination of the rights of thousands of people.

At the same time Quindaro also filed its formal objection to the attorney general's motion to dismiss because if granted such motion would prevent Quindaro from furnishing essential government services to its 17,674 residents by permitting the ordinances under attack to stand as valid. The attorney general had moved to intervene eighteen months after commencement of the case and after the commissioner had fixed the date the hearing was to begin. Validity of the ordinances was of great importance to the taxpaying residents of Quindaro and the city. Due to the one year statute of limitation for filing such actions (G. S. 1959 Supp. 12-502c), the motion to dismiss was an attempt to secure final determination without a hearing on the merits. If permitted the attorney general's action would usurp the judicial power vested in the court and would thereby break down our traditional doctrine of separation of powers by substitution of one man's views for those of a duly-constituted court. The attorney general is without authority to interfere with the county attorney herein, and

in the interest of justice the attorney general's motion should be overruled. Finally, it was claimed the attorney general's action violated sections 1 and 18 of the bill of rights and sections 1 and 2 of article 3 of our state constitution.

Quindaro also filed a motion for permission to maintain the action if the county attorney was held not to be able to do so. Quindaro alleged its readiness, willingness and ability to present the case to the commissioner.

The city filed its motion for judgment on the pleadings as against Quindaro because Quindaro had no legal capacity to sue, no material issue of fact was presented by its answer which admitted the allegations of the petition, and no valid cause of action or defense was stated as to the city.

At the hearing before the commissioner on August 17, 1959, Quindaro filed a motion to stay and substantially stated that on August 10, 1959, the governor had directed the attorney general not to dismiss the proceeding but to prosecute it and assure all parties an opportunity to present the issues to the commissioner and the court; that the attorney general had no authority to continue with his motions and they should be stayed and stricken.

The record discloses that Foster appeared and was present during the hearing of August 17, 1959, at the close of which he made the following statement:

> ". . . I have an interest in the case as County Attorney, I have taken no affirmative action other than I have not objected to Mr. Anderson's motion to supersede me, because I believe that is my duty."

At that time four corporations filed separate applications for leave to intervene as owners of land sought to be annexed. In brief, their principal complaint was that the ordinances had been passed and officially published with-

out notice to them or opportunity to be heard, and if the ordinances were allowed to become effective, the corporations would be subject to city taxes, control and other burdens; and further, if subsequent to the commencement of the action and after eighteen months of waiting, the attorney general were allowed to carry out his purpose, the result would be the taking of each intervenor's property without due process of law in violation of the fourteenth amendment to the federal constitution.

We have not set out the complete contents of the pleadings because they contain facts, contentions and issues necessary to a complete determination of the merits of the case which, as we have already stated, is not presently the issue before us.

The governor and attorney general of our state are constitutional officers under the executive branch of our government, as provided in article 1, section 1 of our Kansas constitution. The terms of G. S. 1949, 75-108 provide:

> "Whenever the governor shall receive notice of the commencement of any action or proceedings, by which the rights, interests or property of the state shall be liable to be affected, he shall inform the attorney general thereof, and require him to act in conjunction with the counsel of the proper party to protect the interests of the state; and in any such case, or in any action prosecuted or defended in behalf of the state, he may, if the public interests require it, employ such counsel as he shall deem proper to assist in any such action or proceeding; and in case of the absence or sickness of the attorney general, or if he shall be in any way interested adversely to the state in any action or proceeding, the governor may employ counsel to act in his stead."

G. S. 1949, 75-702 provides:

> "The attorney general shall appear for the state, and prosecute and defend all actions and proceedings, civil or criminal, in the supreme court, in which the state shall be interested or a party, and shall also, when required by the governor or either branch of the legislature, appear for the state and prosecute or defend, in any other court or before any officer, in any cause or matter, civil or criminal, in which this state may be a party or interested."

In view of the plain, clear and unambiguous language of the first portion of 75-702, it is mandatory upon the attorney general to appear in this court as stated therein and any additional direction from the governor could have no more effect than the legislative mandate. We are not called upon, and we are not now determining whether the attorney general, before appearing "in any other court" would have to be required to do so by the governor, or either branch of the legislature.

It follows that in this court any case in which the attorney general appears involves the public interest. The corollary is likewise true because wherever the public interest is involved or the state is a party, the attorney general is primarily the proper counsel to appear.

Duties of a county attorney are prescribed in G. S. 1949, 19-702, as follows:

> "It shall be the duty of the county attorney to appear in the several courts of their respective counties and prosecute or defend on behalf of the people all suits, applications or motions, civil or criminal, arising under the laws of this state, in which the state or their county is a party or interested."

No useful purpose would be served by discussing all the cases where county attorneys have appeared when the

state was a party, or interested, because in no case was his right so to do challenged, considered, or determined, as we are here required to do.

In view of Foster's acknowledgement of service of the attorney general's motion, together with his quoted statement at the hearing of August 17, 1959, to the effect that he was not objecting to the intervention and supersession of the attorney general, and in view of the fact that he sat at the counsel table with the attorney general and conversed with him during oral argument before this court, it appears fair to conclude that Foster was in accord with the manner in which the attorney general was conducting the case. To put it in another way, if Foster had any objection, he should have made it known to the court. On the contrary, he said he was not objecting. The result is he could only have been consenting. By his further action of sitting beside and conversing with the attorney general, instead of with Quindaro's counsel or with some of the numerous other counsel present who apparently were adverse to the attorney general's action, Foster acquiesced in that action. This court in an original proceeding certainly has the right and authority to rely on the appearances and conduct of counsel during the presentation of the matter. By mentioning Foster's attitude, we in nowise desire to create the impression that we are minimizing the power and authority of the attorney general as a real and proper party to appear, prosecute or defend in this court on behalf of the state, as provided in G. S. 1949, 75-702, about quoted, where the rights of the state or the public interest is involved. (Dassler's Kansas Civil Code, Annotated, 2nd ed., Quo Warranto, § 13, p. 818; § 22, p. 823.) Had there been any controversy between Foster and the attorney general, that situation is well discussed in the opinion in *State* v. *Finch*, 128 Kan. 665, 280 Pac. 910, where immunity granted to an informer in a liquor prosecution was within the discretion of the attorney general whose dismissal of the county attorney's

attempted prosecution case of the informer was held to be proper by this court. The Finch case, so far as it applied to the rank of the county attorney and attorney general, was relied on in *State, ex rel.*, v. *State Highway Comm.*, 133 Kan. 357, 299 Pac. 955.

In regard to a contention as to the governor's authority for giving his direction to the attorney general not to dismiss the case but to proceed to final judgment on the merits, we pause to note a few of the cases cited on this point. *State, ex rel.*, v. *Dawson*, 86 Kan. 180, 119 Pac. 360, involved a mandamus action to require prosecution under the prohibitory liquor law by the attorney general and this court therein stated the governor had authority to direct the attorney general to examine a witness when a violation of the liquor law came to his attention. It must be remembered, however, that a prosecution for violation of the prohibitory liquor law would have been brought elsewhere than in the supreme court and also that the prohibitory liquor law conferred more power on the governor than he possesses in other cases in which the state may be involved. (*State* v. *Finch*, supra, p. 667, where the Dawson case, *supra*, was cited.) Our attention is further directed to *Markham* v. *Cornell*, 136 Kan. 884, 18 P. 2nd 158, in which former Governor Harry Woodring, by a long distance telephone call from New York to his private secretary, directed him to send a requisition to the secretary of state requesting a commission for the appointment of Markham as superintendent of public instruction to fill a vacancy caused by death. This attempt by the governor to perform an official act while outside the territorial limits of the state was held to be of no effect, but at the same time his absence from the state did not "constitute his becoming 'incapable of performing the duties of the office' so as to permit the lieutenant governor to assume the powers and duties of the governor." (Syl. ¶¶ 1, 2.)

We cannot agree with the contentions that these cases are determinative of the question now before us. A more recent similar case is *in re Lord*, —— Minn. ——, 97 N.W. 2d 287. There the Minnesota supreme court issued restraining orders in regard to the establishment of daylight saving time. The attorney general by radio and television challenged the supreme court's right to make such an order, and upon the governor's advice, refused to appear before the court to explain or deny his statements. Briefly stated, the Minnesota court held that in preserving the separation of powers of the three branches of government, the governor has no power to clothe the attorney general with immunity from the disciplinary powers of the court when the attorney general appears in court as an attorney; that courts have no jurisdiction over the executive in the performance of executive functions and it is equally vital to our form of government that the executive shall have no power to interfere with the courts in the performance of judicial functions; and finally, that one who is admitted to practice as an attorney at law is an officer of the courts and both by virtue of his oath of office and the customs and traditions of the legal profession, he owes to the courts the highest duty of fidelity. (Syl.)

Applying the above reasoning to our present case we conclude the attorney general by his motion to intervene and supersede the county attorney exercised his powers and duties under the constitution and appropriate statutes; this was as far as he could go as an executive officer and as an attorney and officer of this court. Since he is an officer of the judicial branch, under the separation of powers of the three branches of government, he was limited and restricted in his conduct before this court by the code of professional ethics (164 Kan. xi) to the same extent any other lawyer would be. If, therefore, the attorney general considered the action unmeritorious, he not only had the authority, but he also had a duty to move for dismissal. We cannot think that the framers of our

state constitution or the members of the legislature ever intended that the governor should have control over the judicial branch, or its officers, as is advocated by Quindaro in its brief. Each of the three branches of our government should be zealous of its jurisdiction and each should also be vigilant to see that it does not encroach upon the jurisdiction of the other two.

Any plaintiff has an absolute right to dismiss his action any time before submission (G. S. 1949, 60-3105; *Barnes* v. *Angwin*, 166 Kan. 469, 201 P. 2nd 1057) and in *Kinsch* v. *Missouri-Kansas-Texas Railroad Co.*, 183 Kan. 224, 326 P. 2d 327, when plaintiff moved to dismiss before final submission, this court held the trial court committed reversible error in overruling such motion. We need not burden this opinion with the lengthy discussion of authorities cited on this well-established point.

We now come to the question of Quindaro's status in this proceeding. In *State, ex rel.*, v. *City of Kansas City*, 169 Kan. 702, 719-721, 222 P. 2nd 714, Quindaro, along with four rural high school districts of Wyandotte county, filed briefs *amici curiae* in support of plaintiff's attack on similar annexation ordinances affecting the Fairfax Industrial district because of the resulting loss of taxes to Quindaro and the school districts. This court substantially there stated that the legislature has the authority to create municipal corporations, to modify their boundaries by increasing or decreasing them, or to disorganize such municipalities. To the same effect is *State, ex rel.*, v. *School District*, 163 Kan. 650, 654, 185 P. 2d 677, wherein *State, ex rel.*, v. *French*, 111 Kan. 820, 208 Pac. 664, and *School District* v. *Board of Education*, 110 Kan. 613, 204 Pac. 758, were cited as authority for the proposition that school districts, like many other municipalities, are creatures of the legislature and are subject not only to its power to create, but also to its power to modify or dissolve. Such school districts therefore have no vested

rights in their existence and are subject to the legislature's power to extend or limit their boundaries, consolidate two or more under one, or abolish one or more of them altogether.

The most favorable interpretation to be made of the pleadings of Quindaro and the intervenors indicates they are attacking the city's attempt to extend its corporate limits to include new territory, which is a reorganization of the city that in turn involves its corporate validity. Such an attack can only be made by the state. The landmark case of *Smith* v. *City of Emporia*, 168 Kan. 187, 211 P. 2nd 101, 13 ALR 2d 1272, makes this point crystal clear and includes a thorough discussion of many of the leading cases cited by the parties to this appeal. See, also, *Lampe* v. *City of Leawood*, 170 Kan. 251, 253, 254, 225 P. 2nd 73.

In *City of Blackwell* v. *City of Newkirk et al.*, 31 Okla. 304, 121 Pac. 260, the conclusion of the Oklahoma supreme court likewise was that only the state may question extensions of city limits and, as shown in the opinion (p. 329), this conclusion was based at least in part on decisions of our Kansas court.

There appears to have been no violation of article 4, section 4 of the federal constitution or of the fourteenth amendment. These questions were fully discussed and decided in *Kies* v. *Lowrey*, 199 U.S. 233, 239, 240, 26 Sup. Ct. 27, 50 L. ed 167, and we shall not repeat them in detail except to say that a state legislature has absolute power to make and change subordinate municipalities such as counties, towns and school districts because they are auxiliaries of the state. In *Hunter* v. *Pittsburgh*, 207 U.S. 161, 28 S. Ct. 40, 52 L. ed 151, the city of Pittsburgh, Pennsylvania, undertook to annex the city of Allegheny even though the latter, a much smaller city, had voted by majority vote against the annexation. Hunter, along with three other residents who were citizens, voters, taxpayers, and owners of real and personal property in

Allegheny, filed exceptions to the petition of Pittsburgh, and Pittsburgh answered the exceptions. Allegheny was allowed to intervene with the four citizens but made no changes in the record. The exceptions of the four citizens to the petition there alleged were more far-reaching than the contentions set out by Quindaro here, but the same rules, in substance, were applied in affirming the disallowance of the exceptions of the four citizens, joined in by the city of Allegheny as intervenor.

We conclude the findings of fact made by our commissioner which are substantially set out herein are correct and they are approved. However, in view of the many authorities cited by the parties, all of which have been considered though only a few have been mentioned herein, we find ourselves unable to agree with the commissioner's recommended conclusions of law except that part where he denied the petitioning corporations leave to intervene by reason of their not being proper parties, as shown in *Smith* v. *City of Emporia*, supra. We further conclude the attorney general was entitled to intervene for the reasons that (1) Foster, as county attorney, lodged no objections to the action of the attorney general and, in fact, he appeared to cooperate with him; and (2) following the applicable rules of law, the attorney general is superior to a county attorney in appearances before this court in original cases involving the state, or the public interest. Once the attorney general in his executive capacity appears in this court, he has the duty as an officer of this court, to limit his conduct as prescribed by the code of professional ethics; the governor, although the head of the executive branch of our state government, cannot control the authority and power of the officers of this court, which heads up the judicial branch of our state government. As previously stated, the attorney general, plaintiff herein, had an absolute right to dismiss this action and the allegations in Quindaro's pleadings must fall because they clearly show that Quindaro, one

municipality, is questioning the organization, or reorganization, of the city, another municipality, and this can be done only by the state through its proper officers.

Other contentions of the parties need not be determined.

The ultimate result is we hereby terminate this particular proceeding by ordering that the case be dismissed.

It is so ordered.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 41072

STATE OF KANSAS, ex rel., Robert J. Foster, County Attorney of Wyandotte County, Kansas, *Plaintiff*

vs.

THE CITY OF KANSAS CITY, KANSAS, a municipal corporation; Paul F. Mitchum, Mayor Commissioner; Earl B. Swarner, Commissioner of Finance, Health and Public Property; Joseph P. Regan, Commissioner of Boulevards, Parks and Streets; and Quindaro Township, Wyandotte County, Kansas, a body politic and corporate, *Defendants*

AMENDED REPORT, RECOMMENDATIONS AND CONCLUSIONS OF LAW

STATEMENT OF STATUS OF PROCEEDINGS

1. The above-entitled action was filed as an original action in the Supreme Court of the State of Kansas on January 8, 1958, by Donald E. Martin, who was the duly

qualified and acting County Attorney of Wyandotte County, Kansas. An amended and supplemental petition was thereafter filed in said proceeding by Donald E. Martin on August 7, 1958. In the amended and supplemental petition it is alleged that after the filing of the original petition and on January 28, 1958, the defendant City of Kansas City, Kansas attempted to enact Ordinance No. 41427, and on March 25, 1958, attempted to enact Ordinance No. 41525, and on April 15, 1958, attempted to enact Ordinance No. 41557, and on June 24, 1958, attempted to enact Ordinance No. 41659, and on July 22, 1958, attempted to enact Ordinance No. 41700; all of the ordinances so numbered are alleged to be void, and not authorized by the Legislature of Kansas, and are also alleged to be ordinances attempting to annex land lying within the area attempted to be described in Ordinance No. 41258, attempted to be enacted on December 10, 1957, alleged to be void as beyond the City's power by both the original, and the amended and supplemental petitions.

2. Thereafter the defendant Quindaro Township on October 8, 1958, filed its answer in which all of the ordinances described in the amended and supplemental petition were alleged to be void, and in which affirmative relief by way of injunctive relief in aid of judgments previously entered was prayed, and the defendants except Quindaro Township filed on October 28, 1958, an answer to the answer of Quindaro Township and said defendants filed an answer to the amended and supplemental petition, on October 28, 1958.

3. Thereafter and on November 13, 1958, the plaintiff by Donald E. Martin filed its reply.

4. Thereafter and on the 18th day of November, 1958, the plaintiff by Donald E. Martin filed a motion for the appointment of a commissioner. This motion was resisted by the defendant The City of Kansas City, Kansas, on the ground that the facts could be stipulated. The motion was

sustained by the Court on the 28th day of November, 1958, with the proviso that a Commissioner would be appointed on February 2, 1959, if the parties had not theretofore agreed on a stipulation of facts. Thereafter, and on application of the parties, the matter of appointing a Commissioner was continued from time to time until a renewed application was filed on April 22, 1959 by the plaintiff for the appointment of a Commissioner, the Commissioner being appointed on the 30th day of June, 1959.

5. The Commissioner held a conference with attorneys representing all parties to the action on July 21, 1959.

6. On July 22, 1959, the Attorney General filed in the cause his motion to supersede, strike from the files, and to dismiss. Also on the 22nd of July, 1959, the defendant Township filed its objection to the Attorney General's motion to intervene, its objection to the Attorney General's motion to dismiss, and its motion to permit it to maintain the action.

7. On the 31st day of July, 1959, the defendants except the defendant Quindaro Township filed a motion for judgment on the pleadings as against the defendant Quindaro Township.

8. On the 10th day of August, 1959, the Governor of the State of Kansas caused to be given to the Attorney General of the State of Kansas the following direction:

> "I understand you have filed motions to intervene and to dismiss Case No. 41,072 (the Fairfax Annexation case) which is pending in the Supreme Court of Kansas.
>
> "It is not my intention to take sides in this case, but since it has been set for hearing August 12, 1959, it is my opinion there should be a final judicial determination of the matter.
>
> "It is not proper to deprive parties of their day in court.

"Therefore, I require, under Sec. 75-702, G. S. 1949, that you do not dismiss this proceeding and that you proceed to prosecute it and assure all parties an opportunity to present the issues to the commissioner and to the court."

SUGGESTED CONCLUSIONS OF LAW

Hearing was had in Kansas City, Kansas, on Monday, August 17, 1959, on all motions pending at that time.

Since the above hearing applications for leave to intervene have been filed by Phillips Petroleum Company, Union Pacific Railroad Company, Girten Investment Company and Sealright-Oswego Falls Corporation. The various motions filed herein were taken up and considered in the following order:

1.

MOTION OF QUINDARO TOWNSHIP TO STAY AND STRIKE PROCEEDINGS BY THE ATTORNEY GENERAL IN CONNECTION WITH THE ATTORNEY GENERAL'S MOTION TO DISMISS AND THE ATTORNEY GENERAL'S OBJECTION TO THE PLEADINGS FILED BY QUINDARO TOWNSHIP

At the opening of the proceedings, the motion was filed by Quindaro Township setting out a copy of a letter by the Governor of the state, addressed to the Attorney General, inviting his attention to proceedings to be had in this case, the letter concluding that

> "Therefore, I require under Section 75-702 G. S. Kansas 1949, that you do not dismiss this proceedings and that you proceed to prosecute it and assure all parties an opportunity to present the issues to the Commissioner and to the Court."

The Attorney General, in open court, acknowledged receipt of this letter and stated in effect that he intended to dis-

regard it, and that he would proceed and urge his motion to supersede the County Attorney and insist upon a dismissal of this case.

It is the conclusion of the Commissioner that the Governor of the state does have authority to direct the Attorney General in some respects and that in this case he was acting within the scope of this authority. That the Attorney General having refused to comply with the direction of the Governor might be compelled to do so by an appropriate proceeding instituted by the Governor. However, it is the opinion of the Commissioner that 7-107 G.S. Kansas, 1949, does not apply in this case; that this section of the statute is intended to give a litigant authority to inquire as to the right of an attorney claiming to represent another party litigant where such authority is not disclosed by the record in the case.

In this case, the Attorney General, by reason of his office, is authorized to represent the State of Kansas. The question of whether or not he is properly representing the state or acting in defiance of a direction of the Governor is not within the scope of the inquiry authorized in Section 7-107 G.S. Kansas 1949.

The above finding that the motion of Quindaro Township contained a copy of a letter from the Governor to the Attorney General is based upon the record at the time of the hearing August 17, 1959. The application of Quindaro Township was verified and the correctness of the statements therein contained were not challenged by affidavit or any type of denial. However, on the hearing on objections the parties might have to the proposed report, the Attorney General's office raised the question of the truth and propriety of this finding and, as the record of the hearing on September 21, 1959, will disclose, verifax copies were introduced which disclose a difference in that the township's motion did not state the point of origin of the telegram or the letter, which was Miami, Florida. These

were all allowed to go into the record and the Attorney General's office relied heavily on Markham vs. Cornell, 136 Kansas 884 in support of the Attorney General's contention that the Governor had no authority to give any orders outside the state of Kansas. It was stated into the record that the Governor was outside the state returning from a Governors Conference and, hence, it would appear that he was on official business. That being the case, Markham vs. Cornell does not support the Attorney General's position or require any change in the conclusion of law hereinabove set out.

2.

MOTION OF THE ATTORNEY GENERAL TO SUPERSEDE, STRIKE FROM THE FILES AND DISMISS, AND OBJECTION OF QUINDARO TOWNSHIP TO THE ATTORNEY GENERAL'S MOTION.

The files in this case disclose that the original petition was filed January 8, 1958. The supplemental petition filed herein discloses that the last ordinance that is being attacked became effective July 22, 1958. The files further disclose that this action was brought and the supplemental and amended petition was filed by the then County Attorney of Wyandotte County, Kansas, Donald E. Martin, whose office expired in January of 1959; that Robert J. Foster, his successor in office, was substituted for Donald E. Martin. That John Anderson, Jr., was at the time this suit was filed the Attorney General of this state and has been in that office at all times since then and is now the Attorney General. That on July 22, 1959, he made his first appearance in this case by motion to supersede the County Attorney and to dismiss the suit.

That under the law of this state a city ordinance can be challenged only by some proceedings commenced within one year after the ordinance became effective. That if the Attorney General is allowed to dismiss this proceedings,

the ordinances attacked in the proceedings brought by the County Attorney will remain effective for the legality of and adoption [sic] cannot be challenged in a suit commenced after July 22, 1959.

It is the conclusion of the commissioner that the parties affected by the adoption of these ordinances had a right to have the legality of the adoption of the ordinances in question inquired into in a quo warranto proceedings. That such inquiry should have been initiated by the Attorney General or County Attorney of Wyandotte County. That had request for the initiation of such a proceeding been made and refused by both the Attorney General and County Attorney, mandamus proceedings against them should have been entertained. This right, however, terminated July 22, 1959. In view of the fact this suit had been commenced and was during all that time properly prosecuted, no action could have been taken by the parties directly interested. That the Attorney General having sat idly by until the time in which the parties directly affected could bring any action to require the prosecution of this suit had expired, he cannot now supersede the County Attorney when his avowed purpose in asking to supersede the County Attorney is to dismiss this case and prevent a hearing on the merits.

Section 75-702 of the General Statutes of Kansas for 1949 imposes on the Attorney General the duty to "prosecute and defend all actions and proceedings, civil or criminal, in the Supreme Court, in which the State shall be interested or a party." The statute does not empower the Attorney General to appear in a proceedings in which the public is interested and dismiss the proceedings and thereby defeat the interest of the public.

That if it should be determined that he has a right to supersede the County Attorney he does not have the right to dismiss these proceedings unless all parties hereto consent thereto. Quindaro Township was made a party de-

fendant. The original petition and the supplemental and amended petition stated Quindaro Township had or claimed an interest in this litigation. In the prayer it was asked that they be required to set up what interest, if any, they did have in this litigation. The township has answered and joined in plaintiff's request that these ordinances be vacated and set aside. The township has filed objections to the Attorney General superseding the County Attorney or dismissing this case.

It is the conclusion of the Commissioner that the objections of Quindaro Township are valid and should be sustained. That the Attorney General should not be allowed to supersede the County Attorney at this late date or dismiss this case.

3.

MOTION TO PERMIT QUINDARO TOWNSHIP TO MAINTAIN THE ABOVE ENTITLED ACTION.

The township has filed a motion seeking authority to maintain this action to determine the validity of the ordinances involved as set out in plaintiff's petition, in the event it should be held that the above entitled action should not be prosecuted by the County Attorney of Wyandotte County, Kansas.

It is the conclusion of the Commissioner that Quindaro Township, having been made a party to this action and having, pursuant to the request of the plaintiff, set up its interest herein, and further in view of the fact that the County Attorney had stated in a preliminary conference called by the Commissioner and had July 21, 1959, that a Mr. Leonard Thomas, attorney for Quindaro Township, would carry the burden for both the county and the township in view of the County Attorney's lack of familiarity with this case; that regardless of whether or not the County Attorney or the Attorney General continue to prosecute this case, Quindaro Township should be allowed to maintain this action to final conclusion.

4.

MOTION OF THE CITY OF KANSAS CITY FOR JUDGMENT ON THE PLEADINGS AS AGAINST THE DEFENDANT QUINDARO TOWNSHIP.

It is the conclusion of the Commissioner that Quindaro Township, having been made a party defendant by the plaintiff and having joined in the request of the plaintiff and having sought the same relief sought by the plaintiff, it does have legal capacity to prosecute this case to a final conclusion. That the city is not entitled to a judgment on the pleadings and the motion of the city should be denied.

5.

MOTIONS OF PHILLIPS PETROLEUM COMPANY, SEALRIGHT-OSWEGO FALLS CORPORATION, GIRTEN INVESTMENT COMPANY AND UNION PACIFIC RAILROAD COMPANY FOR LEAVE TO INTERVENE.

These corporations all filed motions for leave to intervene stating that they each owned substantial property in the area included in the ordinances involved herein and that they would suffer substantial injuries if the ordinances were not set aside. In the applications it was set out that the attorney general was seeking to dismiss the proceedings and that if the proceedings were dismissed the ordinances would be effective and they would have no recourse.

It is the conclusion of the Commissioner that if the Attorney General should be allowed to supersede the County Attorney and Quindaro Township was not allowed to maintain the above entitled action, or if no one opposed their intervention, they should be allowed to intervene. However, since it is the conclusion of the Commissioner that the Attorney General is not authorized to supersede the County Attorney at this stage of the proceedings, and if the Attorney General is permitted to supersede the County Attorney, even then Quindaro Township is au-

thorized to maintain this proceedings and since the city is opposing the Intervention, these corporations' applications for leave to intervene should be denied. They, of course, no doubt would be given leave to file briefs amicus curiae when the time comes for the Supreme Court to pass upon these conclusions of law or any later recommendations that might be made by this Commissioner. There are, no doubt, many other corporations and individuals whose interests are similar to those of these four corporations, and if these petitioners were allowed to intervene there would be no reason for denying that right to all other parties having property within this tract of 196 acres.

Respectfully submitted,

/s/ JAY W. SCOVEL
Commissioner